Nos. 14,663, 14,664, 14,665

United States Court of Appeals

For the Ninth Circuit

WILLIAM BENZ, et al., *Appellants*, vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,663
M. D. MACRAE, et al., *Appellants*, vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,664
JEFF MORRISON, et al., *Appellants*, vs. COMPANIA NAVIERA HIDALGO, S.A., *Appellee.*	No. 14,665

APPELLANTS' PETITION FOR REHEARING.

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APPELLANTS' PETITION FOR REHEARING.

To the Honorable Homer T. Bone, Wm. E. Orr, Circuit Judges, and to The Honorable Edward P. Murphy, District Judge, Judges of the United States Court of Appeals for the Ninth Circuit:

The appellants respectfully petition the court for a rehearing of this appeal and for a reconsideration

of parts of its decision, and in support thereof respectfully represent that the court erred in its decision that the District Court had jurisdiction to try these damage cases notwithstanding the provisions of the Labor Management Relations Act (29 USCA 141 et seq.) which has preempted the field of labor relations.

Secondly, appellants respectfully represent that the court erred in holding that the acts complained of in these cases constituted actionable torts under the law of Oregon.

I.

THE DISTRICT COURT LACKED JURISDICTION BECAUSE OF THE PROVISIONS OF THE LABOR MANAGEMENT RELATIONS ACT WHICH HAS PREEMPTED THE FIELD OF THE LABOR CONTROVERSY INVOLVED IN THESE CASES.

The application by this court in the cases at bar of the rule of preemption in labor cases as laid down by the Supreme Court in *United Construction Workers v. Laburnum Construction Co.,* 347 U.S. 656, 74 S. Ct. 833 (1954), is contrary to the recent decision of this court on rehearing in *Born v. Laube,* 213 F2d 407 (CA-9 1954).

In replying to our contention that the *Laburnum* case is limited to situations involving violence, the opinion of this court stated as follows:

> "* * * Nothing in the opinion of the court in *Laburnum* suggests an acceptance of that argument, or an intent to restrict its effect to cases

of violent picketing, or other tortious means as distinguished from ends."

However in *Born v. Laube, supra,* this court said:

"The petition for rehearing is predicated largely upon the claim that our decision is in conflict with the intervening holding of the Supreme Court in United States Construction Workers v. Laburnum Construction Corporation, 347 U.S. 656, 34 LRRM 2229.

"We have carefully considered the Laburnum decision and are of opinion that it is distinguishable inasmuch as the complaining party there, under the Labor Management Act, was wholly without remedy in damages for the tortious conduct of the Union. Here the complaining employee had available the remedy of reinstatement with back pay. *Moreover, unlike Laburnum, there was no evidence or threat of violence which might serve to bring the cause within the area of the Territorial police power."* (Emphasis ours).

Born v. Laube, supra is in keeping with the line of cases we cited in our opening brief on page 21 where the Supreme Court allowed concurrent state jurisdiction in labor cases only in furtherance of the state's police power.

The *Born* case is also in keeping with the pre-emption cases involving other fields of federal legislation where the Supreme Court has excluded state participation in fields covered by federal legislation except for the limited exercise of the state's police power. *Commonwealth v. Nelson,* U.S. Supreme Court, Apr. 2, 1956.

Also the opinion of the court in the instant cases stated the following:

> "The remedy in the cases before us is damages. No such remedy exists under the federal law for this fact situation. This is not a secondary boycott or a case of an award of back pay to reinstated employees where money damages may be recovered under federal law."

We submit that the foregoing quotation is erroneous because the record affirmatively demonstrates that the conduct upon which the judgment for damages herein was based is conduct which is prohibited by the Labor Management Relations Act and for which a remedy is also provided for damages under the Act.

The type of conduct found by the District Court to have been carried out by the appellants resulting in the judgments for damages against them, is stated in the Findings and Conclusions of the court as follows:

> "On or about September 15, 1952, said striking crew members of the SS RIVIERA designated the Sailors' Union of the Pacific as their collective bargaining representative. On October 14, 1952, members of the Sailors' Union of the Pacific, acting pursuant to said designations and pursuant to a resolution duly adopted by said union, commenced picketing said vessel and continued to picket it until restrained and enjoined from further picketing by this court on November 26, 1952. (Finding of Fact XI, Tr. 241.)

"Said picketing by members of the Sailors' Union of the Pacific was intended to prevent the repairing and loading of the SS RIVIERA; and the sole purpose of said picketing by the members of the Sailors' Union of the Pacific was to compel the plaintiff to re-employ the said discharged, striking members of the crew of the said SS RIVIERA for a shorter period than that stated in the articles, and at wage rates and other conditions more favorable to them than those stated in said articles. (Finding of Fact XII, Tr. 242). (Emphasis ours.)

"Employees of stevedoring and ship repair firms and other shore employees ordered to work on the said SS RIVIERA refused to so work while said pickets representing the Sailors' Union of the Pacific were present. Immediately after the removal of said picket line, employees of contractors with whom plaintiff had contracted for the repair and preparation of the vessel to carry her cargo of grain to India resumed work on said vessel as requested. Plaintiff was unable to use its vessel for the period from October 14 through November 26, 1952, and the sole and proximate cause of such loss of use was the said picketing by defendants. (Finding of Fact XIII, Tr. 242).

"As a further proximate result of defendants' said picketing, plaintiff has suffered definite and measurable damage through loss of earnings and the expense of maintaining the SS RIVIERA and the loyal members of its crew during the period October 14, 1952, through November 26, 1952, in the total amount of $38,700.00. (Finding of Fact XVIII, Tr. 244).

"Defendants' said picketing was the sole proximate cause of plaintiff's damages." (Conclusion IV, Tr. 245).

The foregoing quotations clearly demonstrate the District Court found that the picketing by the appellants constituted a secondary boycott, in that it was intended to prevent the repairing and loading of the SS RIVIERA by inducing and encouraging employees of independent contractors to refuse in the course of their employment to perform services on the vessel in order first to force the independent contractors to cease doing business with the appellee, and secondly to require the appellee to bargain with the Sailors' Union of the Pacific and to rehire the former crew members when the union had not been certified under the provisions of the Act.

It is clear that this conduct constituted *"unfair labor practices"* within the following provisions of said Act (29 USCA Sec. 158 (b)):

> "It shall be an unfair labor practice for a labor organization or its agents — (4) to engage in or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to * * * perform any services, where an object thereof is: (A) forcing or requiring * * * any employer or other person * * * to cease doing business with any other person. (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has

been certified as the representative of such employees under the provisions of section 9."

The Act also provides a remedy for both enjoining the continuance of the unfair labor practice and for the recovery of damages caused by the conduct.

The remedy for enjoining the conduct is provided for in Title 29 USCA Section 160.

The remedy of damages and the procedure for the recovery of damages caused by the conduct constituting this unfair labor practice is provided for under the Act in Title 29 USCA Section 187 as follows:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or self employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such

labor organization has been certified as the representative of such employees under the provisions of section 159 of this title. * * *

"(b) Whosoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties and shall recover the damages by him sustained and the costs of the suit."

We submit that the test established in the *Laburnum* case which allows concurrent state jurisdiction where there is "the lack of a substantially similar remedy in the federal scheme of regulation of labor disputes" has not been met in the cases at bar, because the appellee has a remedy against the unions under the provisions of the Act which we have set forth above. The Act prohibited the particular conduct involved and provided a remedy for damages. For similar secondary boycott cases see *NLRB v. Denver Building & Construction Trades Council et al,* 341 U.S. 675, 71 S.Ct. 943 (1951) and *International Brotherhood of Electrical Workers et al v. NLRB,* 341 U.S. 694, 71 S.Ct. 954 (1951).

The Supreme Court in the *Laburnum* case found that the conduct for which damages were allowed by the state court constituted an "unfair labor practice" within the provisions of Section 8 (b) (1) (A) of the Act. The court held that since the Act set up

no remedy or procedure to compensate the employer for damages which it may have sustained by the union's conduct which constituted this particular unfair labor practice, the employer could resort to the state court to recover such damages as might have been available to him under the state law.

In the cases at bar the Act provides for a remedy in damages for the "unfair labor practices" involved in these cases. The appellee, therefore, was required to bring its actions under the provisions of the Act.

The actions were not brought under the terms of the Act, but were framed under a common law theory of "picketing for an unlawful purpose" and brought as a class suit against individual members of the union. However, under the Act the remedy for damages is provided for against the union as an entity and not against individual members. (Title 29 Section 185 (b)):

> "(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

The Act (Title 29 USCA Section 187) declaring certain unfair labor practices to be unlawful and allowing damages therefor, and providing a remedy for the recovery of damages, establishes the remedy for the tort and impliedly such remedy is exclusive. The court was, therefore, without jurisdiction to enter judgment for the appellee for damages when the action was not brought under the Act. We submit that the judgment should be set aside and appellee's action dismissed.

This conclusion is not affected by this court's observation "that no party to any of these cases at any time had resort to the Board." Resort to the Board to first determine the existence of the unfair labor dispute is not a prerequisite to the remedy for damages under the Act. *ILWU v. Juneau Spruce Corporation,* 342 U.S. 237, 244; 72 S.Ct. 235, 239; 96 L. Ed. 275 (1952).

II.

PICKETING FOR THE PURPOSE OF REQUIRING A SHIPOWNER TO REHIRE SEAMEN WHO HAD STRUCK IN VIOLATION OF THEIR ARTICLES DOES NOT CONSTITUTE PICKETING FOR AN UNLAWFUL PURPOSE UNDER THE LAW OF OREGON.

The opinion rendered by this court in the cases at bar holding that the picketing for the purpose of requiring the appellee to rehire the seamen who went on strike was picketing for an unlawful purpose under the law of Oregon, has placed the burden upon the

appellants to show that such picketing was not tortious conduct rather than placing the burden upon the appellee to show that the conduct for which it seeks damages was tortious conduct. This court said that it could find nothing "to negative the District Court's conclusion that the picketing for the purpose of requiring a shipowner to rehire seamen who had struck in violation of their articles is picketing for an unlawful purpose under the law of Oregon."

The court assumed that the requiring of the employer to rehire the seamen was "an act which is held to be against the public policy of the state." However, neither a statute of Oregon nor a decided Oregon case has been cited which demonstrates that the rehiring of employees who were discharged for cause is against the public policy of the State of Oregon. On the contrary, it is well recognized that a lawful object of picketing by unions is for the purpose of requiring an employer to rehire employees who previously have been discharged notwithstanding the fact that the employees may have been discharged due to their own misconduct. e.g. *Boise Street Car Co. v. Van Avery,* 61 Ida. 502, 103 P2d 1107, 2 CCH Labor Cases, 775, (1940).

In our previous brief beginning on page 8 we discussed fully the lawfulness of the purpose of the picketing, even assuming that it was for the purpose of securing the rehiring of the former crew members. Surely the Federal Court should not determine for the first time the public policy of Oregon when that public policy had not been expressed by the state legis-

lature or courts, and where the appellee had been unable to cite any case allowing damages in this fact situation.

We submit that the court erred in affirming judgments for substantial damages on account of peaceful picketing. The judgments were predicated upon an "unlawful purpose" contrary to an undefined "public policy of the state."

CONCLUSION.

This court should grant a rehearing to reconsider its interpretation of the *Laburnum* case, as applied to the facts in this case. The court should also grant a rehearing in order to settle the contradiction between its holding in the instant cases and the holding in *Born v. Laube,* supra.

The court should also grant a rehearing to reexamine its affirming of the judgments for damages in excess of $50,000.00 based upon picketing in violation of an alleged public policy of Oregon which has not been shown to have been established or recognized.

Dated, Portland, Oregon,
April 27, 1956.

Respectfully submitted,
TANNER & CARNEY,
RICHARD R. CARNEY,
Attorneys for Appellants and Petitioners.

Certificate

I hereby certify that I am one of appellants' counsel; that I prepared the foregoing petition for rehearing, and in my judgment it is well founded. I further certify that said petition is not interposed for delay.

Dated, Portland, Oregon,
April 27, 1956.

Richard R. Carney,
Of Counsel for Appellants.